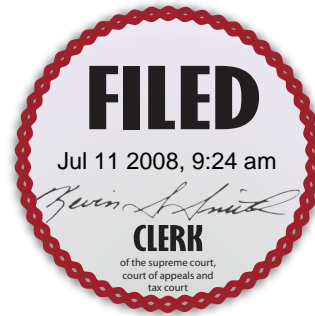


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

RODNEY V. TAYLOR
MICHAEL A. BEASON
Christopher and Taylor
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

JEFFREY J. MORTIER
MAGGIE L. SMITH
Locke Reynolds LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW GREGORY,)
)
Appellant-Plaintiff-Cross-Appellee,)
)
vs.)
)
DAIMLERCHRYSLER CORP.,)
METALDYNE CORP., and)
NC-M CHASSIS SYSTEMS, LLC,)
)
Appellees-Defendants-Cross-Appellants.)

No. 33A01-0712-CV-581

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary Willis, Judge
Cause No. 33C01-0306-CT-15

July 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff-cross-appellee Matthew Gregory appeals trial court's grant of summary judgment in favor of appellees-defendants-cross-appellants DaimlerChrysler Corp., Metadyne Corp., and NC-M Chassis Systems, LLC (collectively, the appellees).¹ Specifically, Gregory argues that the trial court erred in granting summary judgment in favor of the appellees because the evidence establishes a good faith dispute regarding the cause of his seizures. Additionally, the appellees cross-appeal the trial court's denial of their motion to strike Gregory's expert's affidavit and report. Concluding that the appellees were entitled to summary judgment as a matter of law because Gregory's designated evidence was insufficient to establish causation, we affirm the judgment of the trial court.

FACTS

In May 2001, Gregory began working as a laborer for Smoot Construction at the DaimlerChrysler New Castle Machining and Forge Facility (the facility) in New Castle. In January 2002, when he was twenty-seven years old, Gregory experienced his first seizure after returning home from work.

On June 2, 2003, Gregory filed a complaint against the appellees, alleging that his seizures were caused by his exposure to allegedly contaminated soil, water, and toxins at the facility. The appellees requested an independent medical examination. Dr. James C. Pappas, a neurologist, examined Gregory, reviewed his medical records, and concluded that "within a

¹ Today we also hand down a related memorandum decision in Coomer v. DaimlerChrysler, et al., No. 33A01-0712-CV-582 (Ind. Ct. App. Jul. 11, 2008).

reasonable degree of medical certainty that Matthew Gregory has an idiopathic epilepsy or idiopathic seizure disorder with no known cause.” Appellant’s App. p. 35.

On June 4, 2007, the appellees filed a motion for summary judgment, arguing that the designated evidence negated the causation element of Gregory’s negligence action. Gregory filed a response on September 5, 2007, and designated an affidavit from Dr. George Rodgers.² Dr. Rodgers, a professor of pediatrics and pharmacology/toxicology, attested that he had examined Gregory and his medical records and concluded that Gregory

clearly was exposed to a complex mixture of potentially toxic materials. Many of the materials identified on this site, including some of the solvents and metals can cause seizures with excess exposure. . . . I think it is reasonable to conclude that Mr. Gregory’s occupational exposure to this mix of toxic chemicals may have contributed to the onset of his seizure disorder.

Id. at 150. The appellees filed a motion to strike Dr. Rodgers’s affidavit on July 31, 2007, arguing that Dr. Rodgers lacked the necessary qualifications and that his conclusion was speculative, unreliable, and did not utilize the appropriate methodology.

The trial court held a hearing on November 29, 2007. It denied the appellees’ motion to strike but granted their motion for summary judgment, concluding “that there are no genuine issues of material fact, and the [appellees] are entitled to judgment as a matter of law on all claims advanced against them by [Gregory].” Id. at 7. Gregory appeals the trial court’s grant of summary judgment in favor of the appellees, and the appellees cross-appeal the trial court’s denial of their motion to strike.

² In addition to Dr. Rodgers’s affidavit and report, Gregory designated his own deposition, his own interrogatory responses, and the parties’ pleadings. However, Dr. Rodgers’s opinion was the only expert evidence Gregory proffered.

DISCUSSION AND DECISION

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

When a defendant moves for summary judgment, it must show that the undisputed facts negate at least one element of the plaintiff's cause of action. Ind. Mich. Power Co. v. Runge, 717 N.E.2d 216, 226 (Ind. Ct. App. 1999). An essential element in a cause of action for negligence is the requirement of a reasonable connection between a defendant's conduct and the damages that a plaintiff has suffered. Topp v. Leffers, 838 N.E.2d 1027, 1032 (Ind. Ct. App. 2005). A plaintiff's burden of proof may not be carried with evidence based upon

mere supposition or speculation. Id. at 1033. Particularly, the defendant is entitled to summary judgment if the plaintiff cannot establish that his injuries were proximately caused by the defendant's conduct. Runge, 717 N.E.2d at 232.

A mere temporal coincidence between chemical exposure and illness is insufficient to establish a prima facie case on the element of causation. Hannan v. Pest Control Servs., Inc., 734 N.E.2d 674, 682 (Ind. Ct. App. 2000). Instead, when the issue of causation is not within the understanding of a layperson, expert witness testimony is necessary. Runge, 717 N.E.2d at 231. In toxic tort cases, it is important that the expert perform "differential diagnosis" testing to rule out alternative causes of the plaintiff's ailments. Hannan, 734 N.E.2d at 682. When such testing is not performed, "the opinions of the plaintiffs' experts [are] tantamount to subjective belief or unsupported speculation." Id. We reaffirmed this position in Outlaw v. Erbrich Prod. Co., Inc., when we held that

an expert's opinion is insufficient to establish causation when it is based only upon a temporal relationship between an event and a subsequent medical condition. In particular, when an expert witness testifies in a chemical exposure case that the exposure has caused a particular condition because the plaintiff was exposed and later experienced symptoms, without having analyzed the level, concentration or duration of the exposure to the chemicals in question, and without sufficiently accounting for the possibility of alternative causes, the expert's opinion is insufficient to establish causation because it is based primarily on the existence of a temporal relationship between the exposure and the condition and amounts to subjective belief and unsupported speculation.

777 N.E.2d 14, 29 (Ind. Ct. App. 2002) (citations omitted).

In response to the appellees' motion for summary judgment, Gregory designated an affidavit and report from Dr. Rodgers. Dr. Rodgers attested that he had examined Gregory and his medical records and concluded that Gregory

clearly was exposed to a complex mixture of potentially toxic materials. Many of the materials identified on this site, including some of the solvents and metals can cause seizures with excess exposure. . . . I think it is reasonable to conclude that Mr. Gregory's occupational exposure to this mix of toxic chemicals may have contributed to the onset of his seizure disorder.

Appellant's App. p. 150.

A report from GZA GeoEnvironmental, Inc., dated March 26, 2003, identified fifty-one chemical constituents present in the soil and groundwater surrounding the facility.³ Id. at 101-03. Dr. Rodgers does not identify which chemicals Gregory was allegedly exposed to that "may have contributed to the onset of his seizure disorder." Id. at 150. He does not specify the level, concentration, or duration of Gregory's alleged exposure to the unspecified chemicals. Instead, Dr. Rodgers makes vague assertions regarding Gregory's alleged exposure to a "mixture" of "potentially toxic materials[,] including "solvents" and "metals." Id.

Moreover, Dr. Rodgers's failure to account for the possibility of alternative causes for Gregory's seizures renders his opinion insufficient to establish causation. Specifically, Dr. Rodgers never addressed the independent medical examiner's conclusion that Gregory had an idiopathic seizure disorder with no known cause. He also failed to address a skull fracture

³ The concentration levels of forty-nine of the chemical constituents were at levels the Indiana Department of Environmental Management has deemed to be "protective of human health." Appellees' Br. p. 12 (citing IDEM RISC Technical Resource Guide § 2.2.1).

Gregory sustained in an accident as a child. In sum, because Dr. Rodgers did not identify specific chemicals, analyze the level, concentration, or duration of Gregory's alleged exposure, or account for the possibility of alternative causes, his opinion was insufficient to establish causation. Thus, the appellees were entitled to summary judgment as a matter of law.⁴

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.

⁴ We recognize that the appellees challenge the trial court's denial of their motion to strike Dr. Rodgers's affidavit on cross-appeal. However, in light of our conclusion that the trial court properly granted summary judgment in favor of the appellees, we decline to address the substance of the appellees' cross-appeal in the interest of judicial economy.